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Legal Remedies in Environmental law

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Content

Abstract:

The article offers an overview of the present legal remedies scheme in the field of the environmental law and the nature conservation law. It starts from three levels system of legal remedies scheme – national level, EU level and the international level. This approach is combined with the procedural viewpoints, in private interest and in public interest. To these two pillars the constitutional remedies are also added. Emphasis is given to non-governmental organisations (NGOs), which act as agents (alter egos) of the environment and the nature. It is of the utmost importance to ensure at least certain involvement of the NGOs in the decision-making procedure, especially in the administrative, but also in the judicial processes. Locus standi and access to the court are of core importance. The article explores and critically assesses the development of the locus standi for NGOs on the international, and especially the EU level.

Keywords:

Environmental non-governmental organisations (NGOs), legal remedies, EU law, environmental law, nature conservation law, EU Court of Justice, EU General court, European Court on Human Rights (ECtHR), European Convention on Human Rights (ECHR), access to the court, locus standi, Aarhus Convention.

I. Introduction

The notion of *legal remedies* concerns the legal procedures available to secure certain rights. It comprehends notions that are broader than only access to the court. It refers not only to the actions of the individuals, but also to the competences of the authorities to secure rights that advance the greater public interests. For this reason, modern legal systems differentiate between *legal remedies in both the private* and *public interest*. In addition to these two main pillars of legal remedies, there are usually also *constitutional* legal remedies available (if a certain country has a Constitutional Court wich possesses such competences).

Beyond these two, or sometimes three, main pillars, legal remedies are regulated also on the international level. In Europe, the two most important judicial bodies are the Court of Justice of the

European Union (CJEU) and the European Court of Human Rights (ECtHR). This is a general structure.

However, within this general framework there are also significant variations, i.e., solutions which vary from state to state, among national legal systems (like the rules regarding individuals' access to the court; the competences of national authorities regarding legal remedies in public interest; and, procedural and substantive law conditions to secure certain rights, etc.). However, it is common from the comparative view that certain areas of law are regulated in disparate fashions. This is also true in the case of legal remedies and access to the court in matters pertaining to the environment.

There are several particularities and elements which distinguish the environment, and procedures which refer to environment law provisions, from other areas of law. Namely, rights and obligations to secure protection of the environment are intended to benefit the environment itself (rights) and individuals (obligations) need to obey those obligations. This is the case because the environment, as a titleholder of rights, by itself cannot enforce those rights because as a non-person it logically cannot be a party to any legal, i.e. administrative or court, proceedings.

In order to safeguard environmental rights, when individuals breach environmental regulations it is usually the state, acting to protect the public interest, that has the competences to take necessary enforcement action against the individuals in breach of the environmental regulation. However, sometimes even the state can be derelict in its obligations to protect the environment, such as, for example, by failing to adopt necessary rules to protect the environment; adopting rules which are insufficient to protect the environment; or, by failing to take appropriate actions (i.e. procedures) against individuals (when needed) for their failure to comply with environmental rules and regulations. In all such cases the environment is going to suffer damage due to the state's failure to adequately carry out its legal mandate to protect the environment for the public good.

In such cases, the role of non-governmental organisations (NGOs) is crucial, as they act as the agent (*alter ego*) of the environment. However, if the access to administrative and court procedures is restricted to NGOs, it is unlikely that they will be of any help. Since the role of NGOs is crucial in the field of environmental law, it is also important to secure for them access to legal proceedings, i.e. administrative, judicial, constitutional and also international legal proceedings. It is from this prospective easier to understand the importance and the role of the *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matter* (hereinafter *Aarhus Convention*).[1] It is also therefore understandable that NGOs should have wider and easier access to legal proceedings than individuals (except in cases where they must act to secure their own legal rights in the sphere of environmental law). Even the Aarhus Convention does not mandate *actio popularis* (United Nations Economic Commission for Europe, 2014: 198).

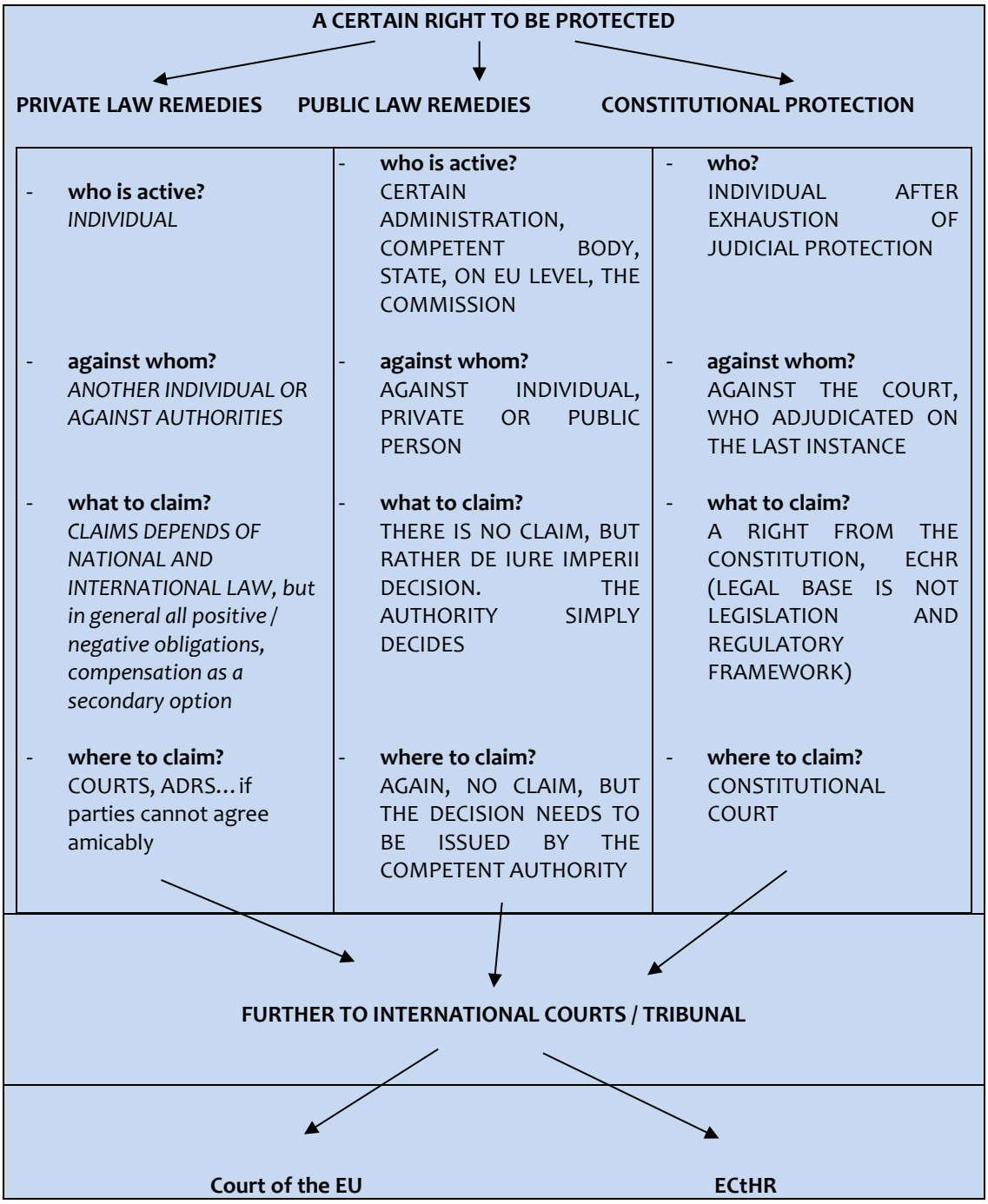
This article provides an overview of the legal remedies available in the field of environmental law both in the public and private interest realms. Further on, it discusses, constitutionally speaking, the access to international legal reviews to safeguarding the environmental protection rules.

[1] The full text of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in the appropriate language can be found at UNECE (The United Nations Economic Commission for Europe) web page: http://www.unece.org/env/pp/treatytext.html (12.7.2016).

II. An Overview of Available Legal Remedies in the Field of Environmental Law in Europe

II.1. Introduction

As noted above in the introduction, the starting point of this article is an overview of the framework of legal remedies which exist in most countries in modern legal systems. We shall first explore legal remedies *in public* and *in private interests*. The framework can also be presented in the following sketch:



- **no direct access from national proceedings (only via Art. 267 TFEU, preliminary rulings)** - **direct access only when attacking EU decisions (action for annulment)** - **very narrow interpretation of locus standi for NGOs and individuals** - **lots of a pressure to the CJEU decisions by the EU General Court, scholars… no real change**	- **exhaustion of all national remedies** - **claims against the state (not the private party/investor)** - **environment is not part of the ECHR, but ECtHR extensively interprets, above all, Art. 8 (right to private life)**

II.2. Legal Remedies in Private Interest (Private Law Remedies)

It will usually not be an obstacle for individuals to enter into any legal proceedings, whether administrative or judicial, assuming the individual's own rights are at stake; i.e. a right impacting the individual's legal position. An individual's rights may have a positive or even negative effect on the environment. For instance, assume a case where an individual would like to obtain a building permit. Logically, a building permit touches upon three opposing interests – that of the individual seeking the permit; third persons opposed to the permit, as negatively impacting their legal interests; and, the interest of the environment, itself. This is an example of a proceeding where the individual would like to secure a right which is negative to the environment. However, in a case where an individual is a party to an administrative proceeding to obtain a building permit, but a third party individual intervenes in the proceeding because the proposed new construction by the individual seeking to obtain the building permit will decrease the value of the third party's immovable property (for instance – granting of the requested building permit will enable construction of a factory, which will pollute the environment), then the third party will simultaneously act to protect both his own interests and those of the environment. However, in (frequent) cases where no third party exists to oppose the party seeking the permit, the environment can only be safeguarded through intervention by the state (within the proceeding of issuing the building permit). The problem arises, however, in cases where the state – at the legislative and/or in the administrative level - fails to intervene to ensure that the interests of the environment are adequately protected.

Most cases are decided with the national administrative procedures although rules that are (originally) not national are also applicable. Namely, on the one hand, EU environmental law is regulated by directives and they need to be implemented into the national legal order. That means that both individuals and the State must rely on the rights and obligations that are stipulated under national law. This is true even though the directives originally are adopted by the EU. On the other hand, the ECHR and case law from the ECtHR also needs to be taken into account by administrative and judicial authorities, meaning that, like the EU law, decisions (judgements) issued by the ECtHR are directly applicable in all levels of decision making and adjudicating procedures at the national level and also *ex officio*. The latter is true for both the EU law and decisions by the ECtHR.

The question of which EU legal remedies will be applicable arises only in cases where EU institutions are competent to decide on individual rights and obligations (mostly by the decisions) and to adopt general environmental measures. This is the reason why the national level is the primary level for individuals to claim rights under EU environmental law and for NGO's to claim rights on behalf of the environment. The national level is discussed first, while the level of the EU legal remedies is

given less emphasis, because, as is discussed below, the EU level is not particularly accessible to plaintiffs seeking legal remedies in EU environmental law.

II.2.1. National level

Legal remedies in private interests form the first pillar (see the sketch above). Under this system, the individual can request that his rights be enforced as a primary claim and, as a possible secondary claim, that compensation be awarded. What exactly constitutes a primary claim depends upon the nature of the claim. It might be a claim to stop a nuisance; it might be a claim to reduce emissions; or to stop pollution; or to assure a healthy leaving environment; or to pay restitution, etc. What can be claimed is dependent upon the particularities of each individual legal order and its substantive law. As long as the legal remedy is closely connected with the individual, or if a legal remedy pertains to the individual's legal status and legal position, the procedural law will, most likely, allow him to enter into the procedure, whether administrative or judicial. If a claim is directed towards another individual (like an investor, a neighbour, a polluter, etc.), the access to the court shall be assured (in case the parties cannot amicably settle their dispute).[2]

On the other hand, if a claim is directed towards the authorities, an individual will have to start the administrative procedure first (except in case of claims for compensation). Namely, if the national legal order offers individuals certain legal remedies to be provided by the state, an administrative procedure must be instituted and at the end of that procedure a decision is issued by the authorities. If an individual is not satisfied with the decision of the authorities, he can start a review procedure and, subsequently, a judicial procedure, i.e. the administrative dispute procedure in which the individual can claim the administrative decision should either be modified or annulled. It is up to national legal orders to regulate administrative disputes, irrespective of whether they consist of one or two-stage procedures. The administrative procedure is of paramount legal importance since it provides the individual an opportunity to initiate a claim for a legal remedy against the state.

Access for entry into the administrative dispute (claim against the state and its authorities) is not always easy. This is also the case in the field of environmental law. The environmental regulatory framework is very comprehensive, and it goes hand in hand with the fact that often the state also acts as the investor for infrastructure projects which it is administering in the environment. Also, the state acts as a custodian of the environment and many decisions need to be adopted *ex officio* (for instance in the fields of waste management, water management, nature protection, etc.) In numerous situations, the state makes decisions which either directly or indirectly impact the environment and/or nature. It is both unrealistic and impractical to think that each individual should have the right to attack state decisions relative to the environment and nature at the court. A contrary view would most probably cause the collapse of the system and legal chaos. Therefore, the opportunity for judicial review of state decisions in environmental law matters is usually quite limited. Individuals have the right to challenge state decisions only in narrowly prescribed cases where, for example, the state decisions directly impact the individual's rights, such as personal rights, property rights, etc. (for instance, if the state acts as an investor and plans to build a road that would cross the individual's property). In these narrow bands of cases, the individual will be able to argue that either the state plans should be declared invalid (i.e. annulled) or, alternatively, that the individual is entitled to fair compensation for the lost property. However, in such a proceeding, the individual safeguards his own legal interests and not those of the public. Regarding

[2] Access to other forms of dispute resolution are usually also possible, like arbitration proceedings, mediation proceedings (ADR), etc. ADR is, however, usually not guaranteed under constitutional or international law.

a claim to defend the public interest, the individual will, in most legal systems, not have standing to the administrative or judicial proceedings. On the contrary, only organisations and groups of individuals forming so called non-governmental organisations, whose aim is to safeguard the environment, are have standing to assert the legal claim. This will be discussed in more detail below.

Allowing access (standing) to the courts for individuals to assert non-personal claims against the state is, as indicated above, unimaginable and would also impose (beside above reasons and legal chaos) enormous administrative burdens on the courts because of the increased volume of cases it would have to process. Therefore, no such right exists, nor is it authorized under the Aarhus Convention (it does not assure the access to the courts for individuals when claiming rights in the public interest against the state, i.e. it does not require *actio popularis*). The same approach has been taken by the CJEU under Art. 263 of the Treaty (TFEU, Action for annulment). If an individual would like to annul a decision of a certain EU authority, it can access the CJEU only in cases where the EU authority's decision directly impacts and concerns the individual. In other cases, the individual lacks standing. Individuals seeking review had to fulfil the conditions contained in the so-called *Plaumann test,*[3] which strictly provides that an act of general application had to affect them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision. The *Plaumann* formula has survived even after the last change of the treaty, and retains its vitality in cases involving decisions in the field of environmental law. Such an approach can be accepted as being rational. The approach is different, however, in cases involving NGOs.

The reason for treating individuals differently from NGOs is because, as noted earlier, NGOs act as agents of the environment (alter ego) and they seek to advance the interests of the environment as opposed to their own. This is their most important distinctive feature.[4] When it comes to NGOs, the *Aarhus Convention*, (and correlatively the obligation of the EU and Member States), obliges both the national and EU legal orders to allow them standing to both administrative and judicial proceedings. In this vein, Arts. 6 and 9 of the Aarhus Convention are of paramount importance. However, based on the jurisprudence of the CJEU, one can agree with the observations of some scholars that the judicial attitude towards the NGOs in the field of environmental law does not follow the spirit of the Aarhus Convention. The jurisprudence is rather conservative (and also national legal orders generally follow in the footsteps of the EU approach). There are many scholarly articles that explore this issue.[5]

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[3] Case 25-62, Plaumann & Co. v Commission of the European Economic Community, ECLI:EU:C:1963:17.

[4] Of course, NGOs can also claim rights that belong, or should belong, explicitly to them, as a legal person, an organisation, and not the rights that would safeguard the environment and the nature. The above statement does not refer to these kind of situations.

[5] The author proposes at least: Schoukens, 2015, which states: "In a similar manner, the admissibility threshold put forward by the CJEU in its renowned 1963 Plaumann-ruling requires a private party to prove that he or she is in a unique position in relation to the contested administrative or legislative EU act. Not surprisingly, this rigid interpretation, which has been consolidated by the EU courts ever since, bars public interest organisations, such as environmental NGOs, from directly challenging EU acts before the EU courts. In itself, this would matter little if the possibility to indirectly challenge EU acts through national proceedings – which are subsequently brought before CJEU via the preliminary ruling procedure – would effectively counterbalance this lack of direct access to EU courts in environmental cases. However, even if the EU acts are implemented through national rules, national environmental proceedings often face important obstacles too, such as limited standing at national level and reluctance by the national courts to refer the matter to Luxemburg, turning this detour in an ineffective alternative to direct access to EU courts. The direct position of the environmental NGOs before the EU courts stands in marked

Before discussing NGOs standing at national, supranational and international court, let us first discuss paths to the later two courts. An individual can access the supranational level of justice in two basic ways: one is a path to the CJEU and the second is a path to the European Court of Human Rights (ECtHR) in Strasbourg. Each of these two options are discussed in turn below.

II.2.2. The EU Law Level

The access to the CJEU is possible by way of preliminary ruling procedure (Art. 267) as a form of indirect procedure, and by way of an action for annulment or an action for inactivity.[6] By way of preliminary ruling, an individual can be a party to the CJEU judicial proceeding as a plaintiff or as a defendant. Namely, a procedure stars at the national court and it does not matter in which kind of judicial procedure the preliminary procedure is initiated. It might also be a criminal procedure. However, it is not up to the parties of the national procedure to start preliminary rulings procedure, but it is up to national court. The judge of the national court can decide on its own, whether to initiate it or not. According to Art. 267(3), only the courts against which no legal remedy is possible, are obliged to start the procedure. If we apply this to the environmental law case, then a possible scenario could be, that an individual is claiming the application of certain EU environmental provision, or civil law right, that stipulates him certain right. For instance, to claim damages because of the pollution, to obey environmental impact assessment, etc. In case that the right which is claimed is of EU origin or that it interferes with the EU provisions (for instance provisions of the TFEU or the directives), and if there is a need to interpret that EU provision, the court can/must ask for the interpretation. Might be that the right depends on that interpretation. In that case, of course, the individual will be interested for preliminary ruling procedure. However, as mentioned, it is not up to him, this is the decision of the national judge.

In the second case, where an individual could access to the CJEU directly (by way of direct actions), the case is going to concern, mostly, the annulment of certain EU act, most likely the decision (individual act). Such acts are in case of the environmental law, rather rare, especially when they concern natural persons. It is more likely that the decisions issued are headed to the Member State or to the companies (for instance decision to forbid an export of certain hazardous waste). In case that the decision is addressed to the Member State, and certain commercial subject is also concerned about the decision (for instance, when the decision forbids Member State to commence

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contrast with recent international developments in the field of environmental justice. By ratifying the 1998 Aarhus Convention in 2005,the EU committed itself to guaranteeing sufficient access to justice in environmental matters. As is widely known, the Aarhus Convention calls for the recognition of a number of procedural rights for individuals and NGOs with regard to the environment. In order to ensure compliance with the EU's obligations under the Aarhus Convention, the European Parliament and Council passed Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies ('Aarhus Regulation'). Some welcomed the Aarhus Regulation as a significant step forward in the pursuit of better access to justice at the EU level. However, until today, the internal review procedure has not been particularly successful in altering the predicament of environmental NGOs to the better. Indeed, a quick glance at the recent administrative application of the internal review procedure reveals that most requests for internal review filed by environmental NGOs were rejected by the EU institutions. In most instances, it is upheld that the contested acts do not constitute measures for which internal review is foreseen."

[6] Whereby the action for inactivity (Art. 265 TFEU), is rather very in inefficient. For the reasons, which are beyond the objective of this article, see more in particular Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, EU Procedural Law, Edited by Janek Tomasz Nowak, Oxford European Union Law Library, 2015, p. 427, 439-440.

certain project, like a construction of certain infrastructure, etc. and the constructor loses a business because of that, also such constructor will be interested to start an action to annual the EU decision).

The access to the CJEU in direct actions is restricted, starting with *Plaumann* case and as mentioned above, this is still important case in the jurisprudence; also after the changes of the TFEU. In this respect, cases which relates to environmental and nature protection are of no difference and rules are equally applicable to them. Individuals, starting court actions to safeguard their own interests or interests which they have regarding the ownership, needs to prove individual and direct concern. This is of no difficulties if a decision is addressed to them, but in case that the decision is not addressed to them or also in cases where general acts are in question (like decisions in the form of regulations, or other (non)legislative acts) this is much more difficult. In cases where an individual would like to safeguard the public interest the approach in not less strict. Actually, the fact that an individual would like to safeguard the general interest is of no help with respect to his *locus standi*. This will not make his position any better. On a contrary, most likely, this will not help him to fulfil the condition of the individual concern. Safeguarding the public interest might only help the NGOs. But even this is questionable. This issue is addressed bellow.

II.2.3. The ECtHR level

Another possible way to gain access to the international level in order to adjudicate environmental law cases is by asserting a claim against the State at the ECtHR. The ECtHR is a court which adjudicates on the substantive legal grounds and which has its own convention (ECHR). There is no specific mention about the environment in the ECHR. However, rulings made by the ECtHR have extended Arts. 2 (right to life) and 8 (right to private life) also to the cases involving environmental protection.[7] According to Art. 35 ECtHR, the plaintiff first shall make use of all legal remedies available at the national level. In this way, the national legal system (especially the national judicial system) has the ability to render a judgment consistent with the ECtHR. If the plaintiff believes this is not the case, he can initiate a procedure at the ECtHR. (Substantially) exhausting all national legal remedies means, at a minimum, that a certain amount of time will be needed to complete the national judicial and (perhaps, in case of the competences) constitutional procedures. However, the ECtHR would like to encourage national courts (primary administrative authorities) to consider the ECHR.

There is bit more activism in the decisions of the ECtHR, especially because the ECtHR was obliged to invoke environmental law cases under Arts. 2 and 8. The ECtHR implicitly recognises that the above-mentioned articles of the ECHR include both a right to live in a healthy environment and to receive information about any real or threatened harm to the environment which may affect those individuals entitled to enjoy the rights guaranteed in both articles.[8]

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[7] Art. 8 of ECHR: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[8] Nevertheless, the ECtHR is also struggling with interpretations which would allow individuals easier success in cases of damages related to the environment and human health. Namely, one of the biggest problems usually is submitting sufficient proof to establish the element of causation. For instance, it can be problematic to prove that a cancer was caused by pollution. In the case *Tătar v. Romania* (application no. 67021/01), the ECtHR held

The ECtHR is not a legislator and the states, having taken part in creating the ECHR, are themselves required to include those rights (the right to live in healthy environment and to receive information) in those already listed under the ECHR (García San José, 2005: 67-68); i.e. the ECtHR jurisprudence needs to be taken into account in national administrative (and, of course, judicial) proceedings. The ECtHR refuses to expand upon the environmental dimension of rights, other than those guaranteed in Art. 8 of the ECHR, and in fact has restricted the protection of Art. 8 to cases where the nucleus of the right guaranteed is clearly affected by the environmental interference (e.g. health). The nature of the right at stake, along with its importance for the individual, seem to be the main factors which would reduce the margin of national discretion. For instance, not only the right to respect private and family life but also, and in particular, the applicants' right to sleep at night which, undoubtedly, is closely linked to their right to health. Thus, what is relevant is not so much the objective gravity of the interference suffered by the individual but whether, and to what extent, a right essential to him is affected by that interference. There is a dual aspect in the ECtHR's approach: horizontally, by considering other rights in the ECHR as susceptible to being associated with an environmental harm (e.g., the right to physical integrity (Art. 3) or the right to the peaceful enjoyment of one's possessions (Art. 1 of Protocol No. 1); and also vertically, that is, assuming that those rights which the court has confirmed could be the object of an interference as a consequence of environmental pollution, and that there may be a violation not only when the core of the right is affected but also in its normal and broader content. Thus, where Art. 8 is affected, not only environmental interferences in the applicants' health but also in their well-being should be considered when judging a breach of such provision (García San José, 2005: 68-69).

The ECtHR, nevertheless, interprets Art. 8 very broadly and the ECtHR has found that Art. 8 applies to a wide array of everyday matters impacting the environment and health including industrial emissions and health, exposure to nuclear radiation, natural disasters, passive smoking in detention, environmental risk and access to information, industrial pollution, mobile phone antennas, noise pollution like air traffic, neighbouring noise, road traffic noise, wind turbines and wind energy pharms, industrial noise pollution, rail traffic, emissions from diesel vehicles, urban development, waste collection, waste management, waste treatment and disposal, water supply contamination, etc.[9] One can notice that the areas and the issues to which the jurisprudence of the ECtHR refers, is regulated both by EU and national legislation.

It is therefore necessary, when dealing with cases in national procedures, administrative or judicial, to consider also jurisprudence of the ECtHR. Standards, adopted by the ECtHR, need to be incorporated into the decision-making procedures, administrative and judicial proceedings, and the conclusion might be that at the national level, three legal systems need to be simultaneously applied: *(i)* national provisions, being of legislative nature and also of constitutional nature, *(ii)* the

unanimously that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, on account of the Romanian authorities' failure to protect the rights of the applicants, who lived in the vicinity of a gold mine, to enjoy a healthy and protected environment. The ECtHR awarded the applicants 6,266 euros (EUR) for costs and expenses. It dismissed, by five votes to two, their claim for just satisfaction. Since the ECtHR found no causal link between the health deterioration of Tatar junior and the pollution, no damages whatsoever were awarded. On this point judges Zupancic and Gyulumyan dissented. Their partial dissent offers an intriguing critique of a rigid adherence to classical causal thinking, as opposed to more modern probabilistic theories. In these cases of exposure to toxic materials, the dissenting judges stated that absolute causality is almost impossible to prove in practice. See also paras. 105-106 of the judgment on this point.

[9] For list of cases and there legal summaries, see fact sheet on environment and ECHR, http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf (2.7.2016).

EU law (in same cases rules needs to be applicable – direct effect - or at least consistent interpretation needs to be taken into account) and (*iii*) thirdly, also the ECHR together with the jurisprudence of the ECtHR.

This is rather complex. To this, whenever application of the EU rules are to be applied, the political, social, and economic rights enshrined in the Charter of Fundamental Rights of the European Union also need to be taken into consideration. This complicated legal framework can be confusing to even trained lawyers. One then can easily imagine that individuals, lacking legal training, might be quite lost in the complicated maze of legal rules that are applicable (often simultaneously) to a given case. What has been said is true for the substantive aspects of the law that need to be applied to the case, but there is also a procedural view. This is a bit easier. Namely, whenever procedures are commenced at the national level, the path to the ECtHR only leads through the substantive exhaustions of all national legal remedies (Art. 35 ECHR), including the constitutional legal remedies.

III. Conditions for NGOs to seek environmentally related rights

As discussed above, the NGOs play a paramount role in safeguarding the environment and nature. NGOs must intervene to protect the environment as its agent since the environment cannot claim (i.e. protect) its rights by itself and further since the environment's "official representative" (state authorities) might not represent its best interests all the time. The keenly important role of the NGOs is all the more important when we stop for a moment to consider that under the current framework individuals do not have access to legal remedies except in those farily limited cases where they would like to protect their personal legal rights which might also have, directly or indirectly, positive effects to the environment. However, individuals might (often) like to obtain certain rights which are not for the benefit of the environment. On the contrary, based on these facts, one can be sure that individuals cannot act in the public interest for the sake of the benefits of the environment. This explains why environmental NGOs are extremely important for the protection of the environment and why it is important for them to have access to different administrative and adjudicating processes at both the national and international levels. This further explains why further dialogue is necessary to help improve the overall framework of the legal remedies in the field of environment law, as touched upon below.

The starting point for an explanation of the legal status of the environmental associations andtheir possibilities to have *standing* at courts (also in the EU law not only in the international law) is the *Aarhus Convention*. The *Aarhus Convention* is an important international environmental convention which contains mainly three 'pillars':

- access to information;
- public participation in decision-making procedures; and
- access to justice in environmental matters.

The EU acceded to it in 2005. It was signed by the (then) European Community and subsequently approved by its Decision 2005/370. According to the settled case-law, therefore, the provisions of that Convention now form an integral part of the legal order of the European Union, pursuant to Art. 216(2) TFEU.[10] Currently, the *Aarhus Regulation 1367/2006*[11] deals with the application of its

[10] C-240/09, Lesoochranárskezoskupenie, EU:C:2011:125, paragraph 30 and the case-law cited.

[11] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-

provisions to the institutions and bodies of the EU. As a central issue, Art. 10(1) of the Regulation provides that non-governmental organisations meeting certain criteria are entitled to request an *internal review* by the EU institution or body that has adopted a certain administrative act under environmental law or, in the case of an alleged administrative omission, that should have adopted such an act.
Art. 1 of the Aarhus Convention sets out its objectives:

> "*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*"

The environmental associations are addressed in the definition of '*the public*' and '*the public concerned*' in Art. 2(4) and (5) of the Convention. These provide:

> "*(4) "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;*
>
> *(5) "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.*"

Art. 9 of the Aarhus Convention contains provisions governing legal remedies in environmental matters. Art. 9(2) concerns procedures which have been the subject of public participation, Art. 9(3) applies to all other environmental-law decisions and Art. 9(4) contains specific procedural principles:

> "*(2) Each Party shall, within the framework of its national legislation, ensure that members of the public concerned*
>
> *a) having a sufficient interest or, alternatively*
>
> *b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Art. 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.*
>
> *What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Art. 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.*

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making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13–19.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

(3) In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

(4) In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.
…"

Although the Aarhus Convention was concluded by the EU and all the Member States on the basis of joint competence, it is nonetheless true that, where a case is brought before the CJEU in accordance with Art. 267 TFEU, it has jurisdiction to define the obligations which the EU has assumed and those which remain the sole responsibility of the Member States in order (for that purpose) to interpret the Aarhus Convention.[12] If the CJEU reaches the conclusion that the provision in question is one of the obligations assumed by the EU, then it has jurisdiction to interpret that provision too. In *Lesoochranárske zoskupenie*,[13] the CJEU had to decide (see more below) the issue of the effect of Art. 9(3) of the Aarhus Convention and held that the provision did not contain a clear and precise obligation capable of directly regulating the legal position of individuals. This already narrows down the road to direct effect in the sense of the respective case law of the CJEU. Centrally, Art. 9(3) refers to criteria to be laid down in national law, which makes it clear that a subsequent measure is required for the implementation of the provision.

The history of *standing* for NGOs, and the efforts made to increase their access to justice for the benefit of the environment, is long and complicated, and unfortunately, at the end of the day, too little progress has been achieved. The first notable decision was the case *Greenpeace*, dating back to the 1990's. *Greenpeace* still remains as important judgment bearing on the issue of direct access to the EU courts in environmental matters. *Greenpeace* refused to reconsider the well-established *Plaumann formula*.[14] Rather than relaxing the conditions laid down in the EU Treaty in order to allow individuals having a legal interest in the protection of the environment to gain access to the courts, as the applicants pleaded for, the CJEU opted instead to hold firm to more rigid standards. Also, even the entry into the force of the Aarhus Convention in 2005 it did not change attitude towards more favourable

[12] So-called Slovak Bears case, C-240/09, Lesoochranárskezoskupenie, ECLI:EU:C:2011:125, paragraph 31 and the case law cited.

[13] C-240/09, Lesoochranárske zoskupenie, ECLI:EU:C:2011:125.

[14] Case T-585/93 Stichting Greenpeace Council (Greenpeace International) v Commission [1995] ECR II-2205, ECLI:EU:T:1995:147; Case C-321/95 P Stichting Greenpeace Council and Others v Commission [1998] ECR I-1651, ECLI:EU:C:1998:153.

approach of NGOs' *standing*. The *Aarhus Compliance Committee* reacted to the rigid jurisprudence of the EU courts with the findings and recommendations.[15]

There is also one additional viewpoint. Since the NGOs are not being granted *standing* to justice at the EU level, the EU needs to provide NGOs more access at the *preliminary administrative review stage*, meaning that the NGOs would be able to be party to administrative proceedings at the EU level (at the EU institutions). Such access would in turn minimise possible constraints (i.e. allowing NGOs claims to be heard at least by the administration) and the necessity for judicial process by the EU courts (Schoukens, 2015). This approach did not however, at the end of the day, prove to be successful. Namely, this approach was intended only for acts *having individual character*, meaning only decisions adopted by the European Commission. These limitations to "*measures of individual scope*", proved to be difficult obstacles to overcome (see also Wennerås, 2007: 234; Jans, 2005: 484). There are also several cases[16] in which the NGOs filed lawsuits against EU institutions over their restrictive approach to the internal review procedure, as mentioned above. The EU General court concluded that the limitation of the concept regarding the acts of individual character is not in compliance with Art. 9(3) of the Aarhus Convention. This bold approach by the EU General court was, however, overruled by the CJEU. Even more, in another case[17] the CJEU decided to follow the submissions of the appellants pertaining to the legality review of the *Aarhus Regulation* in the light of Art. 9(3) of the Aarhus Convention. Returning to the basic legal principles underlying the invocability of provisions of an international agreement, the CJEU ruled that provisions of an international agreement can only provide the legal underpinnings for review of an act of EU secondary legislation where the nature and broad logic of that agreement did not preclude it and, additionally, where the provisions at issue were, as regards their content, unconditional and sufficiently precise. With reference to its previous ruling in *Lesoochranárske zoskupenie*,[18] the CJEU held that Art. 9(3) of the Aarhus Convention does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals. By explicitly referring to members of the public who '*meet the criteria, if any, laid down in* (...) *national law*', the latter provision is subject, in its implementation or effect, to the adoption of a subsequent measure.[19] Consequently, the provision could not be relied upon to review the validity of the *Aarhus Regulation* (Schoukens, 2015).

Both cases followed a very narrow interpretation of the implementation rules. The CJEU is of the opinion that EU environmental decisions will be successfully challenged by the EU courts only in exceptional cases. Thus, it is the Aarhus Convention which is narrowly interpreted that way. It is also questionable whether the CJEU's approach is consistent with international law (Art. 3(5) TEU). The CJEU apparently fails to appreciate the exceptional nature of *Lesoochranárske zoskupenie* and rather than expanding the degree of access to the courts through more relaxed conditions instead remains steadfast to the conservative, closed approach towards access to justice at the EU level.

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[15] Findings and recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, Adopted on 14 April 2011, accessible: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/DRF/C32Findings27April2011.pdf (15.7.2016). The reason is that the Committee waited for judgments in Joined Cases C-404/12 P and C-405/12 P, Council and Others v Stichting Natuur en Milieu; Council and Others v Vereniging Milieudefensie; ECLI:EU:C:2015:5.

[16] Joined cases C-404/12 P and C-405/12 P Council and Others v Stichting Natuur en Milieu and Milieu and Pesticide Action Network Europe (CJEU, 13 January 2015); Joined cases C-401/12 P and C-403/12 P Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht (CJEU, 13 January 2015).

[17] Joined Cases C-404/12 P and C-405/12 P, Council and Others v Stichting Natuur en Milieu; Council and Others v Vereniging Milieudefensie; ECLI:EU:C:2015:5.

[18] Case C-240/09 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky [2011] ECR I-01255. For the comments see Eliantonio, 2012: 767; Jans, 2011: 85.

[19] Joined Cases C-404/12 P and C-405/12 P, Council and Others v Stichting Natuur en Milieu (n 12) para 48; Council and Others v Vereniging Milieudefensie.

At the same time the CJEU expects national courts to be more open to offer *locus standi* for environmental NGOs (and use preliminary ruling reference) (Apolline, 2015).

The development which followed regarding this issue is presented in *Draft findings and recommendations of the Compliance Committee*.[20] Namely, on 1 December 2008, the NGO *ClientEarth*, supported by a number of entities and a private individual, submitted a communication to the Committee alleging a failure by the EU to comply with its obligations under Art. 3, paragraph 1, and Art. 9, paragraphs 2, 3, 4 and 5, of the *Aarhus Convention*. This report is titled as Part II (Part I is mentioned above). In Part I, the Committee focused on the main allegation by examining the jurisprudence of the EU Courts on access to justice in environmental matters generally. In doing so, the Committee considered whether in the *WWF-UK* case[21] the EU Courts had accounted for the fact that the *Aarhus Convention* had entered into force for the EU. The Committee decided not to make specific findings on whether the case itself amounted to non-compliance with the Convention. In addition, while awaiting the outcome of the *Stichting Milieu case*,[22] which was still pending before the EU Courts, the Committee refrained from examining whether *Aarhus Regulation* No 1367/2006, or any other relevant internal administrative review procedure of the EU, satisfied the requirements on access to justice in the Convention. The Committee decided to stay its proceedings and the adoption of its findings with regard to the second part of communication ACCC/C/2008/32 until the CJEU adopted its ruling in joined cases C-401/12 P to C-403/12 P and joined cases C-404/12 P and C-405/12 P.[23] In the findings which followed, the Committee found that the EU fails to comply with Art. 9, paragraphs 3 and 4, of the Aarhus Convention with regard to access to justice by *members of the public* because neither the *Aarhus Regulation* nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs.

The Committee therefore recommends that all relevant EU institutions within their competences take the steps necessary to provide the public concerned with access to justice in environmental matters in accordance with Art. 9, paragraphs 3 and 4 of the Aarhus Convention. If, and to the extent that the EU intends to rely on the *Aarhus Regulation* or other EU legislation to implement Art. 9, paragraphs 3 and 4, the Committee recommends to the EU both that the *Aarhus Regulation* is amended in a way, and that any new EU legislation is drafted in a way, that would make it clear to the CJEU that legislation is intended to implement Art. 9, paragraph 3 of the *Aarhus Convention*; and further, that any new or amended legislation implementing it uses wording that clearly and fully transposes the *Aarhus Convention*. In particular, it would be important to correct failures in implementation that are caused by the use of words or terms that are vague and not sufficiently precise to fully correspond to the terms of the *Aarhus Convention*. In addition, the Committee recommends to the EU that the CJEU assesses the legality of the EU's implementing measures in the light of those obligations and acts accordingly; and, that the CJEU interprets EU law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Art. 9, paragraphs 3 and 4.

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[20] Draft findings and recommendations of the compliance committee with regard to communication ACCC/C/2008/32, (part II) concerning compliance by the European Union.

[21] *WWF-UK Ltd v Council of the European Union*, T-91/07, 2 June 2008; and WWF-UK Ltd v Council of the European Union and the Commission of the European Communities, C-355/08, 5 May 2009.

[22] Council and Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe, joined cases C-404/12 P and C-405/12 P, 13 January 2015.

[23] Council and Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe, joined cases C-404/12 P and C-405/12 P, 13 January 2015.

III.1. Are Environmental NGOs entitled also to the moral damages?

As noticed above, the role of NGOs being active in the field of the environment is important, since they represent the environment and the nature, these two not being able to defend their rights in any administrative, civil or criminal procedure. Usually, one of the main issues is whether certain NGO has standing (locus standi) in procedures defending the interests of the environment and with this also our, i.e. public interest. So far, we are used to research and analyse court cases also under the Aarhus convention, focusing to the issue of *locus standi*. However, the question of damages, especially immaterial or moral damages, as a separate one, are not very likely to be awarded.

However, since the damages (whatever kind) do have also the preventive effect this issue might indeed be very important. To this effect, it is worth to analyse also if NGOs are entitled to be awarded with different kind of damages in case that the state or an investor do not comply with the environmental rules. It is not the NGO who indeed suffers the damage, but the environment. But this starting point might not be true in case of moral damages. As a lightning house can serve a decision of the Belgium Constitutional court (N° 7/2016, 21 January 2016, Vogelbescherming Vlaanderen and Terre Wallonne, based also the Aarhus Convention Art. 9, paras. 3 and 4), which, at least according to my information, is rather new, i.e. it shows a new perspective). In this case, explain bellow, the Belgian constitutional court, awarded moral damages to NGO.

In a criminal case pending before the Criminal Court of East Flanders, Ghent Division, concerning illegal hunting practices, a bird protection organisation (Vogelbescherming Vlaanderen) acted as a civil party on the basis of the case-law of the Belgian Supreme Court (see PP and PSLV v. Gewestelijk Stedenbouwkundig Inspecteur and Mvzw), claiming 1.900,00 euro for material and moral damages.

According to the Supreme Court's case-law, it is impossible to award a bird protection organisation a sum per bird killed, as they belong to no one. Furthermore, in the absence of statutory law, the moral damage of an environmental NGO can only be compensated symbolically by awarding 1 Euro compensation.

Vogel bescherming Vlaanderen argued that this case-law discriminated against environmental NGOs in comparison with other legal and natural persons, as such parties are entitled to receive full compensation for the moral damage suffered. The Criminal Court referred that constitutional issue to the Constitutional Court for a preliminary ruling.

The Constitutional Court reached the conclusion that the provision of the Civil Code (Art. 1382) concerning fault-based liability is violating Articles 10 and 11 of the Constitution, if interpreted in such a way so that Environmental NGO's can only claim one symbolic euro as compensation for moral damages. The Court argued that the moral disadvantage an environmental NGO may suffer due to the degradation of the collective interest in the defence of which it is established is, in several respects, special.

In the first place, that disadvantage does not coincide with the ecological damage caused, since ecological damage constitutes damage to nature, so that the whole of society is harmed. The damage concerns goods such as wildlife, water and air, belonging to the category of res nullius or res communes.

Furthermore, the damage to non-appropriated environmental components can as a rule not be estimated with mathematical precision, because it involves non-economic losses. In terms of the

rules governing civil liability, judges must assess the damage *in concreto* and they may base it on equity if there are no other means to determine it.

The compensation must, as far as possible, reflect reality even in the case of moral damage. It should be possible that in the case of moral damage to an environmental NGO, the judge can estimate the damage *in concreto*.

In these circumstances, s/he should take into consideration the statutory objectives of the NGO, the extent of its activities, its efforts to realise its objectives and the seriousness of the environmental damage at stake. Limiting the moral damage to one symbolic euro is in that respect not justified. It would disproportionality harm the interests of environmental NGOs that play an important role in guaranteeing the constitutional right of the protection of the environment.

Therefore, the Constitutional Court promoted another interpretation, concluding that "Article 1382 of the Civil Code does not infringe Articles 10 and 11 of the Constitution, whether or not read in conjunction with Articles 23 and 27 of the Constitution and Article 1 of the First Additional Protocol of the European Human Rights Convention in that the interpretation does not preclude the granting to a legal entity pursuing a collective interest, such as the protection of the environment or specific components of it, compensation for moral damages to that collective interest, that goes beyond the symbolic sum of one euro."

This interpretation, that is consistent with the Constitution, is binding for the referring judge and in fact also for other judges charged with ruling upon similar cases.

The judgement should put an end to different approaches taken in case law. In fact, there are already some past examples of Belgian courts awarding full compensation for moral damages of environmental NGOs (see e.g. CITES crimes - Court of Appeal, Ghent, 7 May 2015).

I personally believe this is a proper example of additional pressure to all those who harms the nature and the environment. It is a shift towards ethical appraisal of the environment, not only the legal one. It is a kind of Copernicus' revolution, helping primarily to administrative and criminal law procedures in which the environment is at stake. Since the protection of the environment has a huge public support, the ethical judgment can be of certain effect. I am fully aware that awarding moral damages is not an ethical judgment, but it is close to that. I am quite sure that the court did not stop, when deciding the above case, only with the legal reasoning, but that the reasoning was broader, reaching elements beyond the pure law; i. e. elements of ethics and including the message of moral judgment of to the public.

IV. Conclusions

The conclusion is possible, based on the above, that the legal remedies scheme in cases of the environmental law is rather complex and, most problematically, presently both individuals and NGOs are being denied sufficient access to the courts contrary to the spirit of Aarhus Convention and to the detriment of the environment and nature. This is also true for the access to the administrative and court proceedings on the international level. At the international level, mostly the CJEU, but also ECtHR, expect that the national courts (and administrative authorities) shall allow greater access to decision making and adjudicating procedures.

This is rather logical. On the other hand, and unfortunately with this approach, not all of the decision-making processes are taking place at the national level. To the contrary, a good deal of the

decision-making, which does not need the transposing measures, is taking place on the EU level and accordingly it should be equally important to provide adequate access to the EU courts. But, bearing in mind that as previously discussed, access to the EU courts is severely restricted for NGOs, it is indeed necessarily incumbent on of both the national courts and the national administrative authorities to allow a more open attitude at least towards NGOs, if not the individuals (*actio popularis* is, at the outset, not a proper solution and can cause a substantial deadlock in *de iure imperii* decision-making procedures). Otherwise, there will be actually no legal platform for the NGOs to safeguard and to harbour the protection of the environment and nature – in the public interest.

As noted above, especially in cases where national authorities do not take proper care of the environment and nature, the NGOs remain in the vanguard of environmental protection. Stripped of their ability to carry out this important role by representing the interests of the environment, the whole picture is fully changed. Such a restrictive approach to access to the judicial system unfortunately provides the national authorities with unfettered authority to make decisions and to proceed with projects affecting both the environment and nature, even for those projects that are unnecessarily harmful to the environment and future generations. This is not a criticism of the legislator (whether or national, EU or also on international level) but instead points to the fact that it is the judges that are judicially tasked with the responsibility of interpreting the *Aarhus Convention*.

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